Supreme Court, U.S.
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No. (1)

In The

Supreme Court of the United States

HECTOR VARGAS,

Petitioner

v.

LOCAL UNION NO. 32B - 32J, and
2727 REALTY, LLC,

Respondents

On Petition For Writ Of Certiorari
The United States Court of Appeals
For the Second circuit

PETITION FOR WRIT OF CERTIORARI

HECTOR VARGAS
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PRO - SE

May 3, 2008

QUESTIONS PRESENTED

I. Was the grant of Summary Judgment dismissing petitioner's complaint that alleged a hybrid claim under Section 301(a) of the Labor Management Relations Act, 29 U. S. C. § 185 (a) against his union and alleged employer proper because there were no genuine issues of material fact and that the moving party was entitled to a judgment as a matter of law ?

II. Has the petitioner shown that local 32BJ breached its duty of fair representation because the union acted arbitrary or in bad faith, or in a discriminatory fashion ?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Andrew L. Strom
Office Of The General Counsel,
SEIU Local 32BJ
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New York, N. Y. 10013

Robert Sparer
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2727 Realty LLC
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STATUTES AND RULES

29 U. S. C. A. § 185

C P L R § 7510

Multiple Dwelling Law of the State of New York § 301

§ 27-217 Administrative Code of the City of New York

OTHER: N/A

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from The opinion of the United States court of appeals appears at Appendix **A** to the petition and is

[X] reported at **2007 U. S. App. LEXIS 25125** or,

[X] has been designated for publication but is not yet reported; or,

[X] is unpublished.

The opinion of the United States district court appears at Appendix **B** to the petition and is

[X] reported at **2006 U. S. Dist. LEXIS 77034** or,

[X] has been designated for publication but is not yet reported; or,

[X] is unpublished.

JURISDICTION

[X] For cases from federal courts: The date on which the United States Court of Appeals decided my case was October 24, 2007

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ____ (dated) on _____ (dated) in Application No. _____ A ____ The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

29 U S C A § 185

§ 185 Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments. Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and

in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets. **(c)** Jurisdiction For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members. **(d)** Service of process The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency For the

purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the June 23, 1947, c.120, Title III, § 301, 61 Stat. 156,) HISTORICAL AND STATUTORY NOTES: Revision Notes and Legislative Reports 1947 Acts. House Report No. 510, see 1947 U. S. Code Cong. Service, p. 1135. References in text: This chapter, referred to in subsets. (a) & (b), was in the original "this Act" meaning act June 23, 1947, c. 120, 61 Stat. 136, as amended, known as the Labor Management Relations Act, 1947, which is classified principally to this sub - chapter and subchapters III (section 171 et seq.) and IV (section 185 et seq.) of this chapter. For complete classification of this act to the Code, see Tables.

CPLR § 7510 Confirmation of award

The court shall confirm an award upon application of a party made within one year after its delivery

to him, unless the award is vacated or modified upon a ground specified in section 7511. HISTORY: Add, L 1962, ch 308, eff Sept 1, 1963. Earlier statutes: CPA §§ 1458, 1461, 1463; CCP § § 2373, 2376; 2 RS 542, § § 9, 12.

ADVISORY COMMITTEE NOTES: This section is substantially the same as CPA § § 1461 and 1463. It retains the former provision that the grounds for vacating or modifying an award may be urged in opposition to a motion to confirm although a motion based on such grounds is not then timely. Thus, a party is not compelled to move to vacate an award but may assert the alleged invalidity when the opposing party seeks to confirm the award. Cf. § 203 (c) (if a defense or counterclaim arises from the same transaction as the adversary's claim, it may be interposed to the extent of that claim notwithstanding that it could not be maintained at the time of the commencement of the action). The application to confirm, vacate or modify the award is interrelated and is therefore integrated under

this article. If application to vacate or to modify an award is denied, the subsequent order will confirm it. Similarly, an order modifying an award will confirm it as modified without another application. See § 7511 (c). See also Pirsig, Toward a Uniform Arbitration Act, 9 Arb J (ns) 115, 117 (1954). Although judgment may not be entered directly upon an award that has not been confirmed, it may be enforced even after the time to confirm has expired by bringing an action on it unless the parties have agreed otherwise. See 21 Carmody-Wait, Cyclopedia of New York Practice 584-87 (1956). Yet, because of the expeditions summary judgment provided by rule 3212, the latter manner of enforcement is no more burdensome than by confirmation. In order to avoid the anomaly, the limitation applicable to bringing an action has been shortened to one year. See § 215 (5). Arbitration is urged as a quick method of disposing of disputes. There is no reason to permit suits on awards to be brought years after the award was made.

Multiple Dwelling Law of the State of New York § 301

§ 301 Certificate of compliance or occupancy

1. No multiple dwelling shall be occupied in whole or in part until the issuance of a certificate by the department that said dwelling conforms in all respects to the requirements of this chapter to the building code and rules and to all other applicable law, except that no such certificate shall be required in the case of : a). Any class B multiple dwelling existing on April eighteenth, nineteen hundred twenty - nine, for which a certificate of occupancy was not required before such date and in which no changes or alterations have been made except incompliance with this chapter, and b). Any old - law tenement, or any class A multiple dwelling erected after April twelfth, nineteen hundred one, which was occupied for two years immediately before January first, nineteen hundred nine, and in which no changes or alterations have been made except in compliance

with the tenement house law or this chapter, or wherein : (1) two or more apartments are combined creating larger residential units, and (2) the total legal number of families within the building is being decreased, and (3) the bulk of the buildings is not being increased. These exceptions shall not be deemed to relieve any owner from the obligation to make every alteration required in any old - law tenement or other multiple dwelling in compliance with the applicable provisions of this chapter.

2. Except as above provided, no dwelling constructed as or altered or converted into a multiple dwelling after April eighteenth, nineteen hundred twenty - nine, shall be occupied in whole or in part until the issuance of a certificate of compliance or occupancy.

3. Such certificate shall be issued within ten days after written application therefore if the dwelling shall be entitled thereto. The department shall, on request of the owner or of his certified

agent, issue a certificate of compliance or occupancy for any existing multiple dwelling not requiring such certificate, provided that, after an inspection by the department, not violations are found against such dwelling.

4. The heard of the department may, on the request of the owner or his certified agent, issue a temporary certificate of compliance or occupancy for a multiple dwelling or a section or a part thereof for a period of ninety days or less, provided that such certificate shall bear the endorsement that the dwelling has been inspected by the department and complies with all the requirements of this chapter, and that such temporary occupancy will not jeopardize life, health or property. Such temporary certificate may be renewed at the discretion of the head of the department for similar periods but shall not extend, together with such renewals, beyond a total period of two years from the date of its original issuance.

5. A certificate, a record in the department, or a statement signed by the head of the department that a certificate has been issued, may be relied upon by every person who in good faith purchases a multiple dwelling or who in good faith lends money upon the security of a mortgage covering such a dwelling. Whenever any person has so relied upon such a certificate, no claim that such dwelling had not, prior to the issuance of such certificate, conformed in all respects to the provisions of this chapter shall be made against such person or against the interest of such person in a multiple dwelling to which such a certificate applies or concerning which such a statement has been issued.

6. Notwithstanding any general or local law to the contrary, a certificate issued for any multiple dwelling organized pursuant to the provisions of article nine-B of the real property law, shall be deemed issued for each dwelling unit contained within such multiple dwelling in full compliance with the requirements of this section.

HISTORY: Add, L 1929, ch 713; amd, L 1946, ch 950, eff April 22, 1946, with substance in part transferred from §§ 14 and 302, sub 1Sub 1, par b, amd, L 1968, ch 893, eff June 22, 1968 Sub 1, par b, subpar (1), add, L 1968, ch 893 eff June 22, 1968 Sub 1, par b, subpar (2), add, L 1968, ch 893 eff June 22, 1968 Sub 1, par b, subpar (3), add, L 1968, ch 893 eff June 22, 1968 Sub 4, amd, L 1978, ch 509, § 4, L 1979, ch 131, § 1, eff May 24, 1979. Sub 6, add, L 1992 , ch 406, § 2, eff July 17, 1992 (see 1992 note below).

§ 27-217 Administrative Code of the City of New York

§ 27-217 Change of occupancy or use. (a) No change shall be made in the occupancy or use of an existing building which is inconsistent with the last issued certificate of occupancy for such building, or which would bring it under some special provision of this Code or other applicable law or regulation unless a new certificate of occupancy is issued by the commissioner certifying that such building or part thereof conform to all of

the applicable provisions of this code and all other applicable laws and regulations for the proposed new occupancy or use. (b) Except as provided by law, a new certificate of occupancy shall not be required where the change of use is within the same use group as listed in the amended zoning resolution. Where a building exceeds three stories in height and the change does not exceed twenty per cent of the total floor area, an amendment to the existing certificate of occupancy for such new use shall be issued by the commissioner certifying that the proposed new occupancy and use conforms to the provisions of the laws governing building construction and that the proposed use will not be in conflict with any provisions of the labor law, multiple dwelling law or the zoning resolution.

HISTORICAL NOTES

Section added chap 907 / 1985 § 1

DERIVATION

Formerly § C26-121.5 added LL 76/1968 § 1

STATEMENT OF THE CASE

A. The Parties

1) Hector Vargas, is a former resident superintendent at 2727 University Ave., Bronx, N. Y. 10468. He was interviewed along with his wife and hired with a basement apartment along with the rest of the basement facilities at his disposal and use, in the month of April/May, 1995, by Mr. Martin Blum, General Manager, of S. W. Management, joint Employer with the predecessor employer of 2727 Realty LLC and began his employment the last two (2) weeks in June, 1995.

2) At the commencement of his employment, Mr. Vargas was not told that his superintendent position was covered by a CBA with union local 32E, which office was located at the time 233 Street, Bronx River, Bronx, N. Y., and also he was not told or informed that the basement facilities and apartment provided to him were an illegal one. Around approximately the month of September, 1995, a union local 32E representative came to the building and informed him that the

building he was working at, is a union building with a CBA and that he must sign some forms for membership, which he did. From that time on Mr. Vargas became a union paying dues member of local 32E which is still in existence under Union Local 32BJ its successor which took over at approximately the year 2000.

3) Since the commencement of his employment, Mr. Vargas requested a snow removing machine whenever a snow storm was forecast. When the CBA eventually came into Mr. Vargas' possession, then he noticed that he was entitled for a snow removing machine. From then on again whenever a snow storm was forecast, Mr. Vargas's continued requesting such a machine till he was terminated of his employment for retaliation of union activity requesting a snow removing machine or as he called it a "snow blower." This is the fact as to why Mr. Vargas was truly terminated by letter

dated December 27, 2004, hand delivered to him on December 28, 2004 **(see Calvin Forehand Affidavit marked as Exhibit D)**, and "Not" for occupying an alleged storage room and converting it into an apartment. This was and still is a pretext sham fabrication created by Mr. Martin Blum, who was fully familiar with the building operations and actually knew that Mr. Vargas along with his family were occupying the entire illegal cellar and basement apartment, put there by his alleged employer and landowner himself. In violation of the Multiple Dwelling Law Section 301 and the New York City Administrative Code 27-217 **(see also Mr. Blum Affidavit, sworn affidavit of June 21, 2007, on Mr. Sparer's, accompanying motion for summary judgment)**, who knew from the very beginning of Mr. Vargas employment that he was placing Mr. Vargas and his family in a illegal status which was so obvious and egregious and deceitful and in bad faith by both the Employer and the Union breach of duty by not protecting Mr. Vargas interest and health

as its union member along with his family. Also in its presentation by both the union local 32BJ and the alleged 2727 Realty L L C to the courts that there was no CBA in effect when in reality there was a CBA in effect even though it had expired and a new one secretly had been signed without Mr. Vargas' knowledge, approval or ratification or any opportunity provided by the union to him with the purpose of informing him about the new agreement and providing him with an opportunity to ask questions about it, which adversely affected his status as a union member and a perspective person under the existing CBA who was to be subject to a contract arbitration rights of his employment issues (see CBA its provision on Pg. 29 Article TWENTY - EIGHTH: TERMINATION (d) "In the event neither party fails to give notice sixty (60) days prior to the termination date hereof, this contract shall be continued in full force and effect from year to year." Also on 2727 Realty, L L C Motion for Summary Judgment Exhibit 3 item 9 states: "This agreement supercedes all

contrary or inconsistent terms of the expired contract but the expire contract otherwise shall remain in full force and effect."). **6)** Also see the secret or private settlement marked as Exhibit E, which violated the rights of Mr. Vargas' to have all matters concerning his employment issues sent to an arbitrator duly appointed under pending existing agreements between the union and the employer. This secret agreement was entered into to sacrifice the rights of Mr. Vargas at a time when the Employer had brought two pending summary proceedings against him in the Bronx Housing Court pertaining to his employment issues and this secret agreement sold him out and the union sacrificed him on the behest of his Employer in order to obtain a new CBA extending the duration of the coverage of the existing CBA. The rights of Mr. Vargas was made the sacrificial lamb to obtain this extension by the union.

7) The Union had no business to stay one of the court summary proceedings under index no. 9848/05 and refused to stay the other one under

index no. 9849/05, on the ground that it was an non union issue which its attorney had informed the court after the union had taken on representation of Mr. Vargas. On March 7, 2005, the union attorney failed in either cases to inform the court that a new CBA had been entered into which covered Mr. Vargas' and that he was certainly entitled to have both summary proceedings immediately stayed by the court, since the law favors arbitration of all employment issues. **8)** Mr. Vargas was entitled to arbitration of both cases without any question being asked, see the memorandum of law in support of defendants 2727 Realty L L C's motion for summary judgment submitted by Mr. Sparer at page 3 last paragraph of (A.) The Parties wherein he has indicated that "the CBAs establish a grievance and arbitration procedure that culminates in final and binding arbitration as the sole and exclusive forum for the resolution of disputes between the Union and / or the superintendent and the employer". Also see at page 4 of said memorandum

of law above mentioned at the bottom of page 4 below the last two lines note 4 wherein he indicates as follows: "The most recent CBA, from March 1, 2005 to February 29, 2008 was admitted in evidence as Joint Exhibit 2. **9)** That private settlement or alleged CBA provided for: (a) withdrawal of an unfair labor practice charge filed by the Union with the National Labor Relations Board about Vargas' termination; (b) the issue of Vargas' termination would be submitted to arbitration and 2727 Realty waived any objection to the timeliness of the grievance; (c) court proceedings seeking Vargas's eviction from the superintendent apartment in the building would be stayed and withdrawn if the arbitrator sustained the grievance at arbitration and, if the arbitrator denied the grievance, Vargas would vacate the apartment within thirty days of the award; (d) 2727 Realty would execute a renewal CBA with specified wage and benefit increases; and (e) the CBA would expire the last day of February, 2008." **10)** The District Court for the Southern District of

New York in granting Summary Judgment to the defendants because it could find no genuine issues of material facts overlooked certain salient facts such as while the defendant union had notified the Civil Court of the City of New York, Bronx County Housing Part, that on February 18, 2005, that there was no Collective Bargaining Agreement in effect, it failed to so notify the said Court just 11 days later when such a CBA came in existence between the defendants covering the plaintiff's employment. Additionally, the position of the District Court was inconsistent when it accepted the argument of the defendants that in the case concerning the illegal super's basement apartment and employment was covered by the CBA but not that case concerning an alleged use by the plaintiff of an additional basement facility. In either situation the defendants was on his alleged employer's land with their full knowledge and understanding along with the plaintiff's union full knowledge and understanding of its illegality. How can the Court say that in one case it is a

union situation but not in the other? Not only did the union failed to notify the court of the CBA of March, 2005, but like wise it also failed to notify its own union member the plaintiff of the happening occurrence. Also very important, the District Court alleged that the plaintiff never provided to it the transcript of the Bronx Housing Case under Index No. 9849/05. However, it refers to page 55 of the transcript in its decision page 13 footnote 4 and makes reference to lines 11 thru 25 of page 55 of the Judge Spears transcript under the Index No. 9849/05 case. Lines 11 thru 25 of page 55 of said Judge Spears transcript reads as follows:

"**THE COURT:** Then you obviously didn't understand what I said. The attorney that was representing you originally in this case, determined, long before it came before me, that this room is not part of that collective bargaining agreement. That's the law of the case. Put the papers down. I am not going to deal with that. That collective bargaining agreement is not part

of this case. So, I 'm not -- if all you're going to tell me is about the collective bargaining agreement, then this trial's going to end right now. Because that issue has been resolved."

The determination made by the Bronx Housing Court in the above mentioned case was based on a clear Breach of Duty by the Union Local 32BJ and its assigned attorney to me. It also clearly represents an unfair labor practice of misrepresentation by the Union 32BJ and its assigned attorney, to me as a union member. How can it be said that one room in the building premises covered by the CBA is not part of the CBA when the plaintiff was put in there in the illegal building basement facilities as part of his employment along with his family by the landowner himself with the union local 32BJ's knowledge and consent. The failure to send these two case to arbitration was highly prejudicial to the plaintiff because the labor law favors arbitration and Mr. Vargas had no business to have his matters before the Bronx Housing Court.

When the case came to arbitration in reference to the super's illegal basement apartment, there was already an adverse court decision against the plaintiff, use of the additional room put there by his alleged employer himself for over a period 10 years time. Under such circumstance the plaintiff could not expect to have a fair labor hearing before the arbitrator since also it was the union which did not submit to the arbitrator the original charges it had submitted to the NLBR.

11) On October 24, 2007, the United States Court of Appeals for the Second Circuit issued a "(Summary Order)" which affirmed the judgment of the district court.

REASONS FOR GRANTING THE PETITION

1) The Arbitrator's Award is of no force and effect **BECAUSE** It was not submitted for confirmation to the Supreme Court of the State of New York, for the County of Bronx, by the employer.

2) The Union Local 32BJ with the written consent of the alleged Employer removed the proceeding

brought by the Petitioner to the Federal District Court for the Southern District of New York. As Judge Leo Glasser indicated in his opinion in the case of Sewell v. New York City Transit Authority, 809 F. Supp 208, 213 (F. D. N. Y. 1992). "that under New York Law, an arbitration award is only enforceable if it is confirmed by a court in an Article 75 proceeding and filed with the court in accordance with N. Y. Civ. Prac. L. & R. § § 7510, 7514 (Mckinney 1980). Leddy v. Standard Drywall, Inc., 875 F.2d 383, 385 (2d Cir. 1989) (citing Flora Fashions Inc. v. Commerce Realty Corp., 80 N. Y. S. 2d 384, 386 (Bronx Co. 1948)). "[I]t is the judgment entered on an arbitration award that is given preclusive effect in subsequent litigation." Leddy, 875 F2d at 385 (emphasis in original) (citing Springs Cotton Mills v. Buster Boy Suit Co., 275 A. D. 196, 199, 88 N. Y. S. 2d 295, 298 (1st Dep't 1949), aff'd, 300 N. Y. 586, 89 N. E. 2d 877 (1949)); Allcity Ins. Co. v. Vitucci, 151 A. D. 2d 430, 431, 543 N. Y. S. 2d 86, 87 (1st Dep't), aff'd, 74 N. Y. 2d 879, 547 N. Y. S. 2d 841, 547 N. E. 2d 96 (1989); but see Matter of Ranni's

Claim, 58 N. Y. 2d 715, 458 N. Y. S. 2d 910, 444 N. E. 2d 1328 (1982) (applying collateral estoppel to bar relitigation of issues raised in arbitration proceeding in subsequent administrative proceeding without discussing whether the award was ever confirmed or judgment ever entered)."

3) Under the peculiar requirements of the New York Law, an Arbitrator's Opinion and Award is entitled to no res judicata or collateral estoppel effect if the Supreme Court of the State of New York has not confirmed it. The removal of the arbitrator's Opinion and Award has opened up for decision by a jury in the Federal District Court of the issues of fact raised in the court below. Namely that of duty of fair representation which the union owed to Mr Vargas and which it violated by its secret memorandum of understanding with his alleged employer when on or about March 1, 2005, just approximately six days before Mr. Vargas's was to have a trial of two cases brought by his alleged employer at the Bronx Civil Court, Housing Part, the union and

the alleged employer came to an understanding which was highly prejudicial to Mr. Vargas by agreement to arbitrate his removal from the super's illegal basement apartment without informing Mr. Vargas or the Housing Court that such existed.

4) Mr. Vargas has not been paid his correct salary for many years of service and his union has failed and breached its duty to see to it that Mr. Vargas be paid the salary he was entitled to under the existence of a CBA.

5) The Federal District Court was in no position to sustain the arbitration opinion and award in any respect or manner. The removal of the Article 75 / 78 proceedings before the Bronx Supreme Court by the union with the written consent of the alleged employer to the Federal Jurisdiction set up a bar which prevented any possibility according to the Hon. Judge Leo Glasser, in the above cited cases, for the opinion and award of the arbitrator to be confirmed.

6) Mr. Vargas was the only employee of the Respondent Appellee covered under the CBA. He was entitled to have his cause presented fairly by his union which instead sought to manipulate the arbitration proceeding by first entering into: 1) secret agreement with the alleged employer and not 2) informing Mr. Vargas and the Housing Court of Bronx and any other Courts of such, much to his prejudice. The appointment of Mr. Herzog to be the arbitrator was out of order in as much that the alleged employer and the union under the CBA had existing machinery in operation to handle this matter that there was no good reason for the union and the alleged employer to make a new arrangement to have an arbitration by agreeing to a specific arbitrator to arbitrate of the three man panel all issues, when it was not his time to do so, under existing CBA. **7)** The Federal District Court below never remanded the case back to the State Court. The Bronx Housing Court, without any Authority, Jurisdiction or Justification, took it upon itself to

incorporate the arbitrator's Opinion and Award into its own judgment contrary to the mandates of the common law of New York State and proceeding to issue a warrant of eviction of Mr. Vargas from the illegal super's basement apartment along with from the whole illegal basement facilities. Neither Mr. Vargas nor his helper, his mother, were squatters since they were both validly on the premises and in the land with the permission and knowledge of both his alleged employer and the union local 32BJ.

8) The proceeding in the curt below was a hybrid 301 (a) action of the Labor Management Relations Act, 29 U. S. C. § 185 ©, which the court below had subject matter jurisdiction of. Union local 32BJ had originally filed an unfair labor charge with the NLRB on behalf of Mr. Vargas, that the employer was in violation of Section 7 Rights. After making its secret agreement with the alleged employer by which it extended the CBA, the union withdrew its unfair labor charge from the NLRB to the great prejudice

of Mr. Vargas because the question to be decided by the NLRB became a different question before the one man arbitrator selected by the union and the alleged employer.

9) The question before the arbitrator arranged by the union and the alleged employer had become, "Was the discharge of Superintendent Hector Vargas for just cause? If not, what shall be the remedy?"

10) Because of the lack of knowledge of the secret agreement between the union and the alleged employer, Mr. Vargas was forced to defend himself in a squatter holdover proceeding unsuccessfully although the Bronx Housing Court never found either him or his mother to be squatters and this case decision was used by the arbitrator as the basis of his Opinion and Award in favor of the alleged employer that Mr. Vargas was discharged for just cause. But since the Bronx Supreme Court never confirmed the Arbitrator's Opinion and Award, it would appear that a jury in the court below should now decide these questions.

11) Before the start of the arbitration proceedings Mr. Vargas became aware that the union was not representing him fairly and so he was forced to hire a private attorney by the name Morris Markowitz to represent him instead. The union used this change to require Mr. Vargas and Mr. Markowitz to sign a waiver that stated that there were three parties to the arbitration when in reality there were only two parties. This was done evidently for the alleged employer to beef up his legal representation by securing aid from the Realty Advisory Board. The arbitrator rendered his Opinion and Award on August 15, 2005, no decision was sent to Mr. Vargas attorney until August 31, 2005, when Mr. Markowitz phone Mr. Rothschild and was advised of such by Mr. Rothschild who faxed him a copy of same date. Mr. Vargas received his copy by mail delivery on or about September 9, 2005 because of Mr. Markowitz, diligence.

12) This 16 days delay in receiving a copy of the Arbitration Opinion and Award greatly prejudiced Mr. Vargas in his dealing with the NLRB who would not process Mr. Vargas own complaint against his alleged employer without such decision copy of the Arbitration's Opinion and Award. Since Mr. Vargas could not provide such a copy, the NLRB dismissed his complaint to his great prejudice. Again, Mr. Vargas was also greatly prejudiced at the Bronx Housing Court by the failure of the Union and his alleged employer to inform the court of secret agreement agreed between them just one week prior to Mr. Vargas's Housing Court proceedings.

13) The Union and the alleged employer informed the court that the allege storage room was a non-union issue. Then the question I now ask is, Why did the union and the alleged employer in their secret agreement specifically excluded it from the arbitration proceeding, if this was truly a non-union issue?

CONCLUSION

Based upon the foregoing the Petition, Petitioner respectfully prays that this Honorable Court grant a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit for the reasons set forth herein.

Respectfully submitted,

Hector Vargas, PRO - SE
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May 5, 2008

APPENDIX

APPENDIX A

06-5176-cv Vargas v. Local Union No. 32B – 32J

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER [Filed October 24, 2007]

Rulings by summary order do not have precedential effect. Citation to summary orders filed after January 1, 2007, is permitted and is governed by this court's local rule 32.1 and Federal Rule of Appellate Procedure 32.1. In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the federal appendix or be accompanied by the notation: "(summary order)." A party citing a summary order must serve a copy of that summary order together with the paper in which the summary order is cited on any party not

represented by counsel unless that summary order is available in an electronic database which is publicly accessible without payment of fee (such as the database available at http: //www.ca2.uscourts.gov/). If no copy is served by reason of the availability of the order on such a database. The citation must include reference to that database and the docket number of the case in which the order was entered. At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 24 day of October, two thousand seven.

Present: Hon. Amalya l. Kearse,
Hon. Robert A. Katzmann,
Circuit Judges,
Hon. Jed. S. Rakoff,
District Judge.*

Hector Vargas,
Plantiff - Appellant,
v. 06-5176-cv
Local Union No. 32B - 32J,
2727 Realty, L L C,
Defendants - Appellees.

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* The Honorable Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

For Appellant: Morris Markowitz, Brooklyn, N. Y.

For Appellee Local Union No. 32B - 32J:
Andrew L. Strom,
SEIU Local 32B - 32J,

For Appellee 2727 Realty, LLC: Robert A. Sparer, Clifton Budd & DeMaria, L L P, New York, N. Y. Appeal from a judgment of the United States District Court for the Southern District of New York (Castel, J.). UPON DUE CONSIDERATION IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Judgment of the district court be AFFIRMED.

Appellant appeals the district court's grant of summary judgment dismissing his complaint that alleged a hybrid claim under section 301 (a) of the Labor Management Relations Act, 29 U. S. C. § 185 (a). We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal . We review a district court's order granting summary judgment de novo, and ask whether the court properly concluded that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law . See Miller v. Well - off & Abramson, L. L. P.,

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Hector Vargas, (Electronically filed)
Plaintiff, Date filed 10/24/06
05 CIVIL 9992 (PKC)
- against - JUDGMENT

Service Employees International Union
Local Union No. 32B - 32J, and
2727 Realty, LLC,
Defendants.

Whereas the above-captioned action having come before this Court, and the matter having come before the Honorable P. Kevin Castel , United Stats District Judge, and the Court, on October 23, 2006, having rendered its Memorandum and Order granting summary Judgment in favor of defendants and denying all other relief sought by either party,

it is, ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's memorandum and Order Dated October 23, 2006, summary judgment is granted in favor of defendants and all other relief sought by either party is denied.

Dated: New York, New York

October 24, 2006 J. MICHAEL McMAHON

Clerk of Court

BY:

"s/"

Deputy Clerk

THIS DOCUMENT WAS ENTERED ON 10/24/2006

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Hector Vargas,

Plaintiff,

05 Civ. 9992 (PKC)

- against -

MEMORANDUM AND ORDER

Service Employees International Union Local Union No. 325-32J, and 2727 Realty, LLC,

P. KEVIN CASTEL, District Judge:

Plaintiff Hector Vargas Brings this action against his former employer, 2727 Realty, LLC ("Employer"), and his union, Service Employees International Union Local Union No. 32B-32J ("Union"), seeking compensatory and punitive damages, reinstatement to his position as a superintendent with back pay, costs and attorney's fees and an injunction. Underlying Vargas's claims

is his contention that he was wrongfully terminated from his position as superintendent for engaging in union activities and that he was wrongfully ejected from a basement "party/storage space" that he claims to have occupied with the consent of the defendant-Employer. Plaintiff's claims have been the subject of an arbitration, in which he was represented by his present counsel. The arbitrator found the Employer's termination of plaintiff's employment to have been for "just" cause". The Employer also prevailed in an action it brought in New York City Civil Court to eject plaintiff from the party/storage space. Plaintiff also brought an unfair labor change against his Union before the National Labor Relations Board which was "deferred" by reason of the arbitration. Plaintiff has appealed unsuccessfully within the NLRB. Plaintiff contends that the arbitration award should be "reversed" as the arbitrator's decision was "arbitrary, capricious, an abuse of discretion, not in accordance with law, exceeds his authority under

the collective bargaining agreement, was corrupt, fraudulent and partial and without due process of law." (Amended Verified Petitioned at Par. 18) Defendants rely upon the general principal that only the union, and not a union member, is a party to an arbitration conducted pursuant to a collective bargaining agreement and that only the union has standing to challenge an arbitration award. Relying upon a well - defined exception to that rule, Vargas asserts that his Union breached its duty of fair representation and, for that reason, he may step into the shoes of the Union and assert his claims.

The defendant Union moves for summary judgment asserting that there is no genuine dispute of material fact surrounding its discharge of its duty of fair representation and that it is entitled to summary judgment in its favor. Examining all submitted pleadings, affidavits and exhibits, in a light most favorable to plaintiff, I conclude that no reasonable fact - finder could

conclude that the Union has breached its duty of fair representation. Defendants are entitled to entitled to summary judgment in their favor.

Proceedings in this court

This case was originally commenced in Supreme Court, Bronx County, and removed to this court on November 28, 2005. This court has jurisdiction over the subject matter of this action pursuant to section 301(a) of the Labor Management Relations Act ("LMRA"), 29 U. S. C. § 185 (A).

On February 24, 2006, I issued an order granting plaintiff leave to file an amended pleading and directing that any additional motions to amend be filed within 15 days. Plaintiff filed an Amended Verified Petition ("AVP") on March 10, 2006. On April 17, 2006, plaintiff requested permission to further amend the pleadings. Despite the untimeliness of the request, I waive the pre-motion conference requirement and permitted plaintiff to file a motion to amend. (Docket # 18)

No motion to amend was thereafter filed by plaintiff. However, a Second Amended Verified Petition was submitted to Chambers. There has been no "good cause" shown as to why there was not compliance with my April 17 order. As I advised the parties prior to the filing of the summary judgment motion, the Second Amended Verified Petition is not an operative pleading in this case and I do not consider it in determining this motion. (See 5/12/06 Tr. at 15 - 16)

On June 23, 2006, defendants filed this motion for summary judgment addressed to the Amended Verified Petition. On October 16, 2006, I issued an order directing the defendants to submit the complete record of proceedings before the New York Civil Court relating to plaintiff's claims in this action, as well as a chronology of the actions before the Civil Court. I also invited plaintiff to submit any additional materials for my consideration by noon on October 23, 2006. Defendants' submissions were received while

nothing was submitted by plaintiff.

Background

Plaintiff was the building superintendent at 2727 University Avenue, Bronx, New York, until his dismissed on December 28, 2004. (AVP at Page 3) The Union represents the service workers in the building where Vargas worked and lived. (AVP at Page 5) On December 28, 2004, an agent of the defendant Employer delivered to plaintiff a letter of termination of employment. The stated ground for the termination of plaintiff's employment was that Vargas had an "illegal apartment set up in [a] basement storage room". (AVP Exh. B) As part of his employment. Vargas was permitted to occupy the basement superintendent's apartment. (AVP Page 21) According to Vargas, the Employer asserted that he was illegally occupying a party/storage space in addition to the apartment. (AVP at page 16) Vargas alleges that his employer was "on actual and constructive notice" of his

occupation of the party / storage space and that the stated reason for his termination was a "sham pretest". (AVP at page 22) Vargas asserts that the stated reason was pretestual and that, in fact, he was fired because he requested a snowblower, provision of which plaintiff alleges was required under the collective bargaining agreement. (AVP at pages 10, 13, 27; AVP Exh. A)

While there is a dispute as to which collective bargaining agreement was operative at the time plaintiff's claims arose and were adjudicated, it is undisputed that the most recent agreement between the Union and Employer was signed in March 2005. It is this March 2005 agreement which provided that Vargas's claims concerning the termination of his employment would be submitted to arbitration before Arbitrator Robert Herzog. Vargas terms the March 2005 agreement the "secret settlement" or "secret memorandum". (AVP at page 14) Prior to execution of the March agreement, the Union had filed an

affair labor practice charge before the National Labor Relations Board on plaintiff's behalf against the Employer and S. W. Management LLC. (Vargas Aff. at page 8) Under the terms of the March 2005 agreement, this charge was withdrawn and submitted to arbitration before Arbitrator Robert Herzog. Vargas complains of the outcome and circumstances of that arbitration.

Arbitrator Robert Herzog conducted two days of hearings on the claims of Vargas, May 19, 2005 and July 1, 2005. Although the arbitration was conducted pursuant to a collective bargaining agreement between the Union and Employer, plaintiff chose to be represented by his own counsel, Morris Markowitz, Esq.. Prior to arbitration, plaintiff alleges that, despite their objections, both he and Mr. Markowitz were "coerced" into signing a written waiver.*1 (Plaintiff's Resp. to Rule 56.1 at page 29) The waiver document states that as a result of his choice to be represented by private counsel rather

than the Union, plaintiff waived any claims that he might have against the Union arising out of the arbitration. (Sparer Aff. Exh. 21) It was executed by Vargas, Mr. Markowitz and a representative of the Union. At the arbitration hearing, plaintiff introduced testimony from two building residents, Ms. Dolores Nuñez and Mr. Mandelbaum, and his union representative, Mr. Colin Forehand. (See Vargas Dep. 91 - 94, 180 - 82; Plaintiff's Resp. to 56.1 at page 34) In a thirteen page opinion and award, Arbitrator Herzog found that there was "just cause" for the Employer's termination of Vargas's employment. He found that Vargas's testimony was not credible and was contradicted by his own witness. (See AVP Exh. A at 10 - 12) Nevertheless, Arbitrator Herzog granted Vargas back pay and moving expenses pursuant to the CBA

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*1 Plaintiff further claims that "a copy of the wrong incorrect waiver that did not bare any signatory to the waiver and is in direct conflict and is different from waiver presented" at Sparer Exh. 21 was used by the arbitrator in writing his opinion. (Plaintiff's Resp. to Rule 56.1 at page 29)

The New York Civil Court Proceedings

On December 29, 2004, the day after terminating plaintiff's employment, Employer had filed a petition in New York City Civil Court seeking eviction of Vargas from the superintendent's apartment. On January 28, 2005, Employer filed a second action in New York City Civil Court seeking Vargas's ejection from a second basement space (referred to by plaintiff in the AVP as the "party/storage space"). On March 7, 2005 agreement signed by the Union and Employer, Vargas's eviction from the superintendent's apartment was held in abeyance pending the outcome of the arbitration described above. On November 7, 2005, three months after the issuance of the arbitration decision adverse to Vargas, Employer filed a motion for summary judgment for possession of the superintendent's apartment. Vargas opposed this motion and on February 24, 2006, the parties agreed to a stipulation of adjournment, permitting Vargas to remain in the superintendent's

apartment pending the outcome of the motion pending before this court. As to the action seeking the ejectment of Vargas from the party/storage space, Judge Spears held a hearing at which she heard sworn testimony from both Vargas and Employer's agent Tom Tucker as to the circumstances surrounding Vargas's use of the party/storage space. Judge Spears found adversely to plaintiff, stating that, "I cannot allow you to stay in space that's clearly in violation of the building code. This is not an apartment intended to be used for anything, other than a storage facility...It's dangerous." (Sparer Aff. Exh 19) Vargas's appeal of the ejectment order was denied by the Appellate Term on September 22, 2006.

The National Labor Relations Board Proceedings

On January 10, 2005, prior to the arbitration, plaintiff filed an unfair labor practices claim before the National Labor Relations Board ("NLRB"). On July 7, 2005, plaintiff's charge was deferred by Region 2 of the NLRB pending the

outcome of the arbitration. (See Sparer Exh. 7) Vargas twice appealed the NLRB's deferral decision but was denied on both occasions. (See Sparer aff. Exh 9, 10) In denying plaintiff's request that his claim be heard despite the arbitration proceeding, the NLRB concluded that the arbitration proceedings "were fair and regular and all parties agreed to be bound by the results of arbitration ... that the Union was unsuccessful in prevailing at arbitration was not deemed to be evidence that the Employer and Union sought to discriminate against you." (Sparer Aff. Exh 10) Finally, on February 23, 2006, six months after the arbitration award by Arbitrator Herzog, the NLRB Regional office wrote to plaintiff, dismissing his grievance and stating that "the Board's standards for deferral to an arbitration award have been satisfied .... it appears from the investigation that the arbitration proceeding was fair and regular...." (See Sparer Aff. Exh. 12)

II. Summary Judgment Standard

Summary judgment "shall be rendered forthwith if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). It is the initial burden of a movant on a summary judgment motion to come forward with evidence on each material element of his claim or defense, demonstrating that he or she is entitled to relief. A fact is material if it "might affect the outcome of the suit under the governing law..." Anderson v. Liberty Lobby, Inc. 477 U. S. 242, 248 (1986). The evidence on each material element must be sufficient to entitle the movant to relief in its favor as a matter of law. Vt. Teddy Bear Co., Inc., v. 1-800 Beargram Co., 373 F.3d 241, 244 (2d Cir. 2004).

When the moving party has met this initial burden and has asserted facts to demonstrate that the non - moving part's claim cannot be sustained, the opposing party must "set forth specific facts showing that there is a genuine issue for trial," and cannot rest on "mere allegations or denials" of the facts asserted by the movant. Fed. R. Civ. P. 56(e). In raising a triable issue of fact, the non-movant carries only "a limited burden of production," but nevertheless "must 'demonstrate more than some metaphysical doubt as to the material facts,' and come forward with 'specific facts showing that there is a genuine issue for trial.'" Powell v. Nat'l Bd. Of Med. Exam'rs, 364, F.3d 79, 84 (2d Cir. 2004) (quoting Aslandis v. U. S. Lines, Inc., 477 U. S. Lines, Inc., 477 U. S. 242, 252 (1986)).

An issue of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U. S. at 248. The Court must "view the evidence in

the light most favorable to the non - moving party and draw all reasonable inferences in its favor, and may grant summary judgment only when no reasonable trier of fact could find in favor of the nonmoving party." Allen v. Coughlin, 64 F.3d 77, 79 (2d Cir. 1995) (quotations and citations omitted); accord Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U. S. 574, 587 - 88 (1986). In reviewing a motion for summary judgment, the court must scrutinize the record, and grant or deny summary judgment as the record warrants. Fed. R. Civ. P. 56(c). In the absence of any disputed material fact, summary judgment is appropriate. Id. Mere "conclusory statements, conjecture, or speculation by the party resisting the motion will not defcat summary judgment." Kulak v. City of New York, 88 F.3d 63, 71 (2d Cir. 1996) (citing

Matsushita Elec. Indus. Co., 475 U. S. at 587 (1986). See also Anderson, 477 U. S. at 249-50 (noting that summary judgment should be granted if the evidence is "merely colorable" or "not significantly probative").

III Discussion

Defendants assert that the arbitration award bars plaintiff's claims and31 that plaintiff lacks standing to challenge the arbitration award. "[A]n individual employee represented by a union generally docs not have standing to challenge an arbitration proceeding to which the union and the employer were the only parties." Katir v. Columbia Univ., 15 F.3d 23, 24 (2d Cir. 1994). Vargas does not contend that he was a party to the arbitration agreement. However, a plaintiff may bring suit under section 301 of the Labor Relation's Management Act where the plaintiff can demonstrate that there has been a breach of the duty of fair representation on the part of the union. Id. At 24-25. Underlying this

exception is

the notion that a claim brought under section 301 is effectively two claims, one against the employer for violation of section 301 and one against the union for breach of duty of fair representation. As such, to establish a hybrid section 301/duty of fair representation claim, a plaintiff must make the dual showing that (1) the employer breached a collective bargaining agreement; and (2) the union breached its duty of fair representation to the union member. See DelCostello v. Int'l Bd. Of Teamsters, 462 U. S. 151, 164-65 (1983). Because the two claims against the employer and union are "inextricably interdependent," a plaintiff's ability to sue their employer is contingent on the threshold showing that the union breached its duty of fair representation. See United Parcel Serv., Inc. v. Mitchell, 451 U. S. 56, 62 (1981) (stating that an "indispensable predicate" of a section 301 action is a "demonstration that the Union breached its duty of fair representation.")

To state a claim for relief on a hybrid section 301/duty of fair representation claim, the non-moving party is required to articulate specific facts demonstrating bad faith, discrimination or arbitrariness on the part of the union. See White v. White Rose Food, 237 F.3d 174, 179 (2d Cir. 2001) (citing Marquez v. Screen Actors Guild, Inc., 525 U. S. 33, 44 (1998)). "Conclusory allegations without specifying supporting facts to show a union's lack of good faith fail to state a valid claim. "Spielmann v. Anchor Freight Inc., 551 F. Supp. 817, 822 (S. D. N. Y. 1982).

To survive a motion for summary judgment, plaintiff must come forward with facts demonstrating a triable issue of fact as to whether the Union engaged in "fraudulent, deceitful, or dishonest action." Sim v. New York Mailers' Union No. 6, 166 F.3d 465, 472 (2d Cir. 1999). "A union breaches its duty of fair representation if its actions 'can fairly be characterized as so far

outside a wide rage of reasonableness ... that [they are] wholly arbitrary, discriminatory, or in bad-faith.'" Spellacy v. Airline Pilots Ass'n-Int'l, 156 F.3d 120 126 (2d Cir. 1998) (quoting Airline Pilots Ass'n Int'l v. O'Neill, 499 U. S. 65, 67 (1991); see also Marquez, 525 U. S. at 4 (citations omitted). Plaintiff does not contend that the Union's actions were discriminatory. He argues that the Union's actions were arbitrary and in bad faith. Viewing all of the evidence in a light most favorable to plaintiff, no reasonable fact-finder could conclude that the Union acted in bad faith or arbitrarily and, thus, breached its duty of fair representation. The thrust of Mr. Vargas's lengthy and somewhat obscure pleading is the contention that the Union acted in bad faith by (1) failing to "ethically or zealously represent the Petitioner during the arbitration process and at other times" (Vargas Aff. At page 40); (2) lying to the Civil Court about the presence of a CBA hereby prejudicing Vargas, (AVP at page 59); (3) entering into a "secret settlement" agreement with the defendant Employer

which compelled Mr. Vargas to "forfeit the right to remain in possession of the of the superintendent's apartment and waive his right to a stay of all ejectment proceedings..." (Vargas Aff. at page 62), and (4) failing to ensure that the Arbitrator explicitly addressed both the unfair labor practices claim withdrawn from before the NLRB and the ejectment claims concerning the party space, (Plaintiff's Resp. to R. 56.1 at page 9).

As to the assertion that the Union failed to adequately represent him at the arbitration, it was plaintiff's decision not to be represented by the Union during the course of the arbitration session, plaintiff and his attorney, Mr. Markowitz, were "coerced" into signing a waiver presented by the union. The written waiver recites that plaintiff agreed to waive any claim he might have against the Union "in connection with their obligation to represent me in this arbitration proceeding". (See AVP Exh. A at 4) No threatened use of force is claimed. No threat of withholding an entitlement is asserted. No improper benefit was offered. The

Claim of coercion is entirely conclusory and is insufficient to raise a triable issue of fact. The undisputed fact remains that Vargas selected private counsel to represent him at the arbitration who appeared and acted on his behalf.

Plaintiff next contends that the Union lied about the existence of any CBA, including the March 2005 agreement, to the Civil Court hearing the ejectment proceeding and failed to represent plaintiff in that proceeding. (See plaintiff's Resp. to 56.1 at page 24), "the agreement entered into between union local 32BJ and the alleged employer 2727 Realty LLC was a secret one which...was not told to the Bronx Housing Court on March 7, 2005, to the great prejudice of Mr. Vargas."; Id at page 10, "Union Local 32BJ and its attorneys along with Mr. Vargas alleged employer 2727 Realty LLC and their attorneys knowingly acted in a joint corrupt, collusion matrimony and withheld information to the NLRB and this court and all other courts...") In support of his allegations that the Union lied to the Civil Court about the

existence of a CBA, Vargas alleges that a letter was written from the Union to the New York City Civil Court on February 16, 2005 both denying that any CBA existed and stating that the Union would therefore not represent Vargas in the ejectment proceeding. (AVP at page 57) Vargas claims that this is evidence of an act of deception which constitutes bad faith on the part of the Union. However, a fundamental flaw at the foundation of plaintiff's claims is his belief that a CBA was in effect either at the time of his firing on December 27, 2005 or at the time that the Union wrote to the Civil Court in February 2005.

The presence, or absence, of a collective bargaining agreement determines the rights and obligations that all parties have both to and against each other. Plaintiff contends that a collective bargaining agreement signed in June 1998 was effective at the time his claims arose by virtue of an automatic renewal provision contained in that agreement. Plaintiff alleges that as the June 1998 CBA was never terminated, it renews

automatically on a year - to - year basis and that any subsequent CBAs are "illegal" or not effective. Defendants, however, contend that there have been several superseding CBAs signed in January 1999 and March 2005. The January 1999 CBA took the form of a memorandum of understanding which was signed by the plaintiff*2. Although the document on its face states that it is a CBA, Vargas does not view the January 1999 agreement as a CBA, stating that "it was two pieces of paper that was not honor, was not honor and two pieces of papers that did not alter the contract, but the arbitrated award, that's all" (Vargas Dep. at 52/16-21) The January 1999 agreement contained incorporated terms from a CBA signed between the Union and Employer in 1995 but specifically excluded any inconsistent terms from any prior CBA*3. Critically, the January 1999 agreement was a fixed-term agreement expiring on June 30, 2001, and did not contain, or incorporate, any automatic renewal provision. Although it is admittedly confusing that the January 1999

agreement makes no reference to the June

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*2 While plaintiff asserts that he signed the January 1999 CBA "u.p. (under protest) which was somehow eliminated from the document so only signature appear", Vargas Aff. At page 9, plaintiff does not contest the terms contained in the document or that he did sign a version of the agreement which is substantively the same. (Vargas Dep. pp. 55-61). *3 The 1995 agreement was not submitted by either party

1998 CBA, it remains the fact that the January 1999 CBA expired June 30, 2001. It, therefore, appears that there was no CBA in effect between June 30, 2001 and March 2005. Further, the agreement which was signed between the Union and Employer in March 2005 was not effective until March 1, 2005. As such, when the Union wrote to the court on February 16, 2005 stating that there was no CBA in effect, the statement was accurate. Moreover, counsel did not lie to the court during the hearing held on March 7 about the presence of a CBA. When Vargas appeared in Civil Court on March 7, 2005, counsel for the Employer explicitly stated to the court that the

proceeding relating to the superintendent's Apartment was "in binding arbitration" pursuant to agreement of the parties. (See Sparer Aff. Exh. 19 at 3/6-22) While not explicitly referring to the agreement by name or as a CBA, there is no evidence to indicate that counsel for the Employer hid the presence of an agreement from the court. The Union did not represent Vargas at these proceedings because, as Vargas concedes, the Civil Court found that the ejectment claim was a 'non-union" issue.*4 Furthermore, as a practical matter, any statements made to the Civil Court would only be attributable only to Employer and not the Union. see Sim, 166 F.3d at 472 ("[E]stablishing that the union's actions were sufficiently 'arbitrary, discriminatory or in bad faith' is only the first step toward proving a fair representation claim. Plaintiffs must then demonstrate a causal connection a causal connection between the union's wrongful conduct and their injuries...") (quoting Spallacy, 156 F.3d at 126)

Plaintiff also points to the very creation of the March 2005 agreement. Vargas alleges that the Union acted in bad faith by entering an "illegal" agreement which was "signed in great prejudice of Mr. Vargas and without his knowledge or consent". (See Plaintiff's Mem. In Opp. at 8) Plaintiff's specific allegations of bad faith and arbitrariness concerning the execution of the March 2005 agreement seem to be that he neither approved it nor was he informed of its existence until arbitration commenced. (See Plaintiff's Mem in Opp. At 19, 21) Vargas's assertion that because he was not a party to the March 2005 agreement, it was "deceitful and dishonest and violated my [Vargas'] due process rights" is without basis in fact or law, (See Vargas' Aff. At page 9) As a threshold matter, the Union was not required to

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*4 Plaintiff cites to "trial transcript, page 55, lines 11-25" and goes on to state that he is "now submitting the entire trial transcript of said case under index no. 9849/05" but fails to do so. On October 16, 2006, I requested that Employer's counsel submit the record of the proceedings before the Civil Court in an effort to clarify plaintiff's claims before this court. Employer's submissions indicate that in

prior proceedings held before Judge Mitchell Danzinger, the Union entered an initial appearance on plaintiff's behalf but then requested to withdraw as counsel. The request was consented to by both sides and Judge Danzinger's order permitted the Union to withdraw from the ejectment proceedings. (See Siebel Aff. Exh. A at 5 - 6) The case was then transferred to Judge Spears for a trial where Judge Spears stated that the "collective bargaining agreement is not part of this [the ejectment] case". (See Siebel Aff. Exh. A at 55) As the ejectment was a non - union issue, the Union was not required under any CBA to represent Vargas.

involve Vargas in the process of negotiating a CBA. See 29 U. S. C. § 159(a) (1970) (union is the exclusive bargaining agent of its members for purposes of collective bargaining agreements). While a union's exclusive bargaining po...r requires that it act fairly and not in breach of its duty of fair representation, "[f]ederal labor law does not require rank – and - file ratification of employer - union agreements." White, 237 F.3d at 182. Further, the Supreme Court has noted that review of a union's decisions during collective bargaining must be conducted through a deferential lens. See O'Neill, 499 U. S. at 78 ("Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that

negotiators need for the effective performance of their bargaining responsibilities."). In examining whether a union's actions are in bad faith or arbitrary, courts "evaluat[e] the rationality of a union's decision in light of both the facts and the legal climate that confronted the negotiators at the time the decision was made..." Id.

Here, plaintiff has failed to come forward with any evidence that the March 2005 agreement was executed in bad faith or that the Union acted arbitrarily in their negotiations. Rather than disadvantaging plaintiff, the March 2005 agreement objectively benefits plaintiff. The agreement allows plaintiff to reside in the superintendent's apartment pending outcome of any arbitration proceeding. In fact, plaintiff continues to "occupy as an employee part of the premises as living quarters" pending the outcome of this action. (Vargas Aff. at page 18) It additionally provides plaintiff with a new CBA containing wage and pension increases. Further, it complies with the NLRB's policy of encouraging arbitration of claims.

See United Techs. Corp., 268 NLRB 557, 558 (1984). Plaintiff alleges that the March 2005 agreement works to his detriment as he is required to "forfeit the superintendent's apartment" while the arbitration was pending. (Vargas Aff. at page 62) The text of the March agreement, however, explicitly states that the "eviction case commenced by the employer presenting pending in Civil Court Bronx County...will be Stayed pending the outcome of the arbitration". (AVP Exh. E)

Moreover, plaintiff's assertion that he was not made aware of the agreement until May 19, 2005 is immaterial. As a factual matter, it appears that plaintiff was made aware of some arbitration agreement at the Civil Court proceedings on March 7, 2005. (See Sparer Aff. Exh. 19) Even assuming that plaintiff was not made aware of the of the agreement until arbitration, it is immaterial since, as discussed above, the March 2005 agreement did not in any way prejudice plaintiff at the arbitration. While plaintiff's counsel may wish that he had sooner received the agreement, that alone

does not constitute bad faith nor is it the cause of any injury to Vargas. Finally, plaintiff asserts that as a result of the March 2005 agreement and acts of deception by the Union, less than all of his claims were submitted to the arbitrator. (See Plaintiff's Aff. page 9) The March 2005 agreement did not implicitly or explicitly limit the claims that plaintiff could assert before the arbitrator. Plaintiff's contention that he was not permitted to submit to the arbitrator the claim asserted before the NLRB is contradicted by his own deposition testimony. At his deposition, plaintiff was asked "Did Mr. Markowitz make the argument to the arbitrator that you were fired for union activity?" to which plaintiff responded, "Mr. Markowitz presented all the evidence and all the things that was related for my illegal and unjust firing". (See Vargas Dep. at 172-73) Further, plaintiff does not contest defendants' Rule 56.1 statement that evidence of wrongful discharge for union activity was presented at arbitration but rather acknowledges that "point 26 in the defendants'

joint statement, it is true..." and continues to assert that Arbitrator Herzog did not properly, or more aptly favorably, consider plaintiff's argument. (See Plaintiff's Resp. to 56.1 at page 32) While plaintiff also asserts that he was unable to present his claim for ejectment from the party/storage space to the arbitrator, those claims were adjudicated by the Civil Court.

Conclusion

Drawing all inferences in favor of the non-movant, no reasonable fact-finder could conclude, on the evidence of record on this motion, that the defendant Union breached the duty of fair representation. A breach of duty of fair representation is a threshold requirement to maintenance of a cause of action against a union and employer under section 301. Summary judgment is GRANTED in favor of defendants. All other relief sought by either party is denied.

The Clerk shall enter judgment in favor of defendants.

SO ORDERED.

"/s/"
P. Kevin Castel
United State District Judge

Dated: New York, New York
October 23, 2006

APPENDIX C

Civil Court of the City
of New York County of Bronx Index No. 05/8949
Part
2727 Realty LLC

Claimant(s)/Plaintiff(s)/Petitioner(s)

DECISION/ORDER

- against -

Hector Vargas, Gregoria Antonia
Pichardo de Gaston, "John & Jane Doe

Defendant(s)/Respondent(s)

In this holdover proceeding, petitioner seeks to regain possession of the subject premises, a basement storage room. Petitioner contends that the respondent originally named as John / Jane Doe, are using the premises as living space. Hector Vargas & Gregoria Antonia Pichardo de Gaston, answered, claiming that Mr. Vargas, the superintendent, & Gregoria Antonia Pichardo de Gaston, answered & claimed that they were using the facility as living quarters with petitioner's

approval. The petitioner is amended to include Hector Vargas & Gregoria Antonia Pichardo de Gaston as respondents. END OF PAGE

This matter was tried before this Court on 3/7/05. Gregoria Antonia Pichardo de Gaston did not appear. At trial petitioner established that respondents are using This space in a manner that was not permitted by the petitioner, to wit, using a storage room as living space.

Respondent Hector Vargas admitted that he & his mother were using the space to live in. He also admitted that it was an illegal apartment. Therefore the Court finds that petitioner has met its burden. Petitioner is awarded a final judgment of possession as to all respondents. There is no stay in the issuance of this warrant. (B34346 (4349 - end) B34347 (1 - 4171). END OF PAGE TWO

Date 3/7/2005

Judge Civil Court

"s/"

B.S. Spears, J.

APPENDIX D

Case No. 2 CA-36730 County of New York

State of New York

AFFIDAVIT

I, Calvin Forehand, being duly sworn upon my oath, hereby state as follows: I have been given assurance by an agent of the National Labor Relations Board that this affidavit will be considered confidential by the United States government and will not be disclosed unless it becomes necessary for the government to produce it in connection with a formal proceeding. My Address is: 101 Avenue of the Americas, New York, NY 10013 My Phone Number is: (212) 388 - 3593.

1. I am currently employed by Local 32BJ, SEIU, AFL-CIO (Union) as a Union Delegate since September 11, 2001. My responsibilities as a Union Delegate include enforcing the contract, representing the members, answering questions for members and processing their grievances. The

Union took over shops that were represented previously by Local 32E, SEIU, including the one at 2727 Realty LLC and S. W. Management, LLC, 2000. Until recently, there was only one Union member working for the Employer, Hector Vargas. The collective bargaining agreement covering Vargas' terms and conditions of employment expired in 2002. There has been no new agreement reached, but the Employers have been complying with the provisions in the expired agreement. The expired agreement has a provision in it that states that Vargas is supposed to be provided with a snow blower.

2. On or about December 27, 2004, I received a phone call from Hector Vargas. Superintendent of the Employer's facility. Vargas said that the snow blower he had been asking for since last year was still not provided to him. He said that he needed a snow blower and asked if I could call the Employer and ask about the snow blower. I told

Vargas that I would talk to a manager and see what I could do.

3. Right after I got off the phone with Vargas, I called Tom Torres, Managing Agent. I talked with Torres about the snow blower, and he referred me to Martin Blum, CEO of S. W. Management. S. W. Management is the company that manages the 2727 building. Torres then put Blum on the line. I asked him for a snow blower for Vargas. Blum said that there was really no snow on the ground right now. I questioned what would happen tomorrow, or the next day when it snowed. Blum said that Vargas should go to another building and borrow a snow blower from another superintendent. I asked Blum why he couldn't have the snow blower delivered to Vargas at his building. Blum then said that I should tell Vargas that he's fired. This entire conversation was held over speakerphone. Eddie Feliciano, Union Delegate, was in the room with me during this conversation. I said to Blum

that I was not telling Vargas that he was fired. I told him that if he wanted to fire Vargas, he should write it up and fire him. I also asked him if he knew what he was doing constituted an Unfair Labor Practice. Feliciano then announced over the phone line that he heard everything that Blum just said. Blum hung up the phone after Feliciano said that he heard what Blum said.

4. The following day, Vargas called me and said that he had been fired. Vargas said that he had been given a termination letter. I asked him to fax it to me and to come meet with me in my office. The letter stated the Vargas was terminated because if was discovered by management that his mother was living in the basement. Vargas explained that his mother had been living in the basement for years, and that there was never a problem. He mentioned that members of management had spoken with her in the past and that there was never a problem. To the best of my

knowledge, Vargas never received any discipline or warnings concerning his work performance or the fact that his mother was living in the basement.

5. The Union has filed a grievance on behalf of Mr. Vargas, however, due to the fact that the contract has expired, we cannot take the matter to arbitration. I have read this statement consisting of 3 pages, including this page. I fully understand its contents, and I certify that it is true and correct to the best of my knowledge and belief.

"/s/"
Calvin Forehand

Subscribed and sown to before me on this 25th day of January 2005.

"/s/"
Helena A. Fiorianti
Board Agent
National Labor Relations Board

APPENDIX E

2727 REALTY L L C AND SEIU LOCAL 32BJ

1. The unfair labor practice charge filed by Local 32BJ concerning the termination of Hector Vargas shall be withdrawn with prejudice.

2. The discharge of Hector Vargas from his position as building superintendent at 2727 University Avenue, Bronx, New York and any other issue or grievance relating to his employment shall be submitted to arbitration before Contract Arbitrator Robert Herzog. In connection with the arbitration the employer agrees to waive all objections to the timeliness of the submission.

3. The eviction case commenced by the employer presently pending in Civil Court Bronx County, Landlord Tenant Part under index number 9848/04

shall be stayed pending the outcome of the arbitration. In the event that Hector Vargas is reinstated to his former position the eviction petition shall be withdrawn. In the event that Arbitrator Herzog upholds the propriety of the discharge, then Mr. Vargas shall vacate his apartment within thirty (30) days from the date of the award. The Employer shall execute a renewal collective bargaining agreement with an effective date of March 1, 2005. The pension Fund contribution rates shall be $110.00 per month effective March 1, 2005. $130.00 per week effective March 1, 2006 and $160.00 per month effective March 1, 2007. The position of the superintendent shall continue to be a part-time position. Effective March 1, 2005, March 1, 2006, and March 1, 2007 there shall be a wage increase of $20.00 per month. As was the case previously there shall be no Health Fund contributions due under this Agreement.

5. The collective bargaining agreement shall expire on the last day of February 2008.

Dated: New York, New York
March , 2005

SEIU LOCAL 32BJ
By: "/s"
Goldman

2727 REALTY L L C
By: "/s/"
Blum

APPENDIX F

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: PART 52

INDEX L&T 9848/05

2727 REALTY L L C,
Petitioner,

- against -

HECTOR VARGAS,
Respondent.

DECISION AND ORDER

Present: Hon. Julia I. Rodriguez, Judge, Civil Court

Recitation, as required by CPLR 2219 (a), of the papers considered in review of petitioner's motion for summary judgment and to vacate Jury Demand:

Papers	Numbered
Order to Show Cause, Affirmed	1
& Exhibits Defendant's Affiamation	2
In Opposition & Exhibits Plaintiff's Reply	3

Petitioner commenced this proceeding to recover possession of the subject premises on the ground that respondent's rights to occupancy expired upon "the superintendent's release from employment" [page 4 of Petition]. Respondent

interposed an Answer alleging various defenses, including the claim that he could not be discharged from employment and / or evicted without a finding of good cause pursuant to his Union contract (page 7 of Answer). Thereafter, the eviction proceeding was stayed pending the results of an arbitration proceeding at the National Labor Relations Board (the "Board"). Pursuant to the Opinion and Award dated August 15, 2005, the Arbitrator sustained respondent's discharge of employment finding "good cause" for the termination. Respondent appealed the Arbitrator's findings and the Appeal was denied by the Board on August 22, 2005.

Respondent also commenced an action in Sup[reme Court Bronx County against petitioner (his former employer) and the Union,*1 seeking to reverse the Arbitrator's ruling against him; respondent alleged inter alia that the Arbitartion Award was rendered arbitrarily and beyond the scope of the collective bargaining agreement, and

that the Union breached its duty of fair representation. The Supreme Court action was transferred to federal court in November 2005, and consequently, the U. S. District Court of the Southern District of New York entertained respondent's claims. Respondent's Union moved for summary judgment asserting inter alia that the Arbitration Award barred respondent's claims, and that respondent lacked standing to challenge the Award. After a lengthy discussion.

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*1 Service Employees International Union Local Union No. 32BJ-32J Of the facts and a thorough review of the law, on October 23, 2006 the District Court issued a 16-page Memorandum and Order granting summary judgment in favor of the Union and against respondent.

ISSUES BEFORE THIS COURT:

In November 2006 petitioner moved for a second time to restore the eviction proceeding to the trial calendar and for summary judgment in its favor. In response, respondent served a Jury Demand which triggered the transfer of the eviction proceeding from the eviction proceeding from the

Housing Part to Part 52 of the Civil court. In addition, respondent opposes summary judgment asserting that his Answer raises issues of fact requiring a trial. As an initial matter, on March 7, 2005 the parties agreed to be bound by Arbitration and to "incorporate [the] arbitration into a judgment." It is axiomatic that such an agreement bars a claim to a jury trial. In any event, after consideration of respondent's Answer and affidavit dated December 15, 2006, the court finds that respondent fails to raise an issue of fact requiring a trial. All of defendant's allegations and defenses have already been entertained either at the Board and / or in Federal Court, and respondent did not prevail. Respondent's claim that this court's lacks jurisdiction is simply misplaced and inaccurate. The issue in this proceeding (which was first calendared in February 2005) is whether petitioner may be awarded possession of the subject premises. The court finds that petitioner's submission established that respondent's possession

of the premises was permissible solely as an incident to his employment as the building superintendent, that respondent's termination was upheld by the Board, and that upon respondent's termination of employment his rights to possession expired as a matter of law. Respondent's allegations concerning the apartment's value or lack thereof, and that his apartment and his sister's apartment are illegal, do not raise issues of fact to defeat summary judgment in this holdover concerning rights to possession incidental to employment. For the foregoing reasons, that branch of petitioner's motion to vacate the Jury Demand is granted, and that branch of petitioner's motion seeking summary judgment is also granted, and therefore it is ORDERED that petitioner is awarded a judgment of possession; issuance of the warrant forthwith and execution of the warrant is also forthwith. That branch of petitioner's motion seeking a money judgment for use and occupancy is denied with leave to renew in a plenary action,

as said claim for market value U&(is not substantiated.

Dated: January 16, 2007

"/s/"

Julia Rodriguez
Judge, Civil Court

APPENDIX G

CIVIL COURT OF THE CITY OF NEW
COUNTY OF BRONX: HOUSING PART X

2727 REALTY L L C,
Petitioner - Landlord,

- against -

Index No.
LT 9849/05

HECTOR VARGAS,
Respondent - Tenant.

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851 Grand Concourse
Bronx, New York
March 7, 2005

BEFORE: HONORABLE BRENDA S. SPEARS

APPEARANCES: ROGERS, WALTER & KALKMAN
Attorneys for Petitioner-Landlord

By: ERIC WALTER, ESQ.

HECTOR VARGAS
Respondent - Tenant, Pro Se

TRANSCRIBED BY: JEANINE MARTELLE

PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDING TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE OF PAGE 55

THE COURT: I DON'T THINK YOU UNDERSTAND WHAT I JUST SAID.

THE WITNESS: I UNDERSTAND WHAT YOU SAID.

THE COURT: NO. THEN -- THEN IF YOU DID; YOU WOULDN'T BE TALKING ABOUT YOUR COLLECTIVE BARGAINING AGREEMENT.

THE WITNESS: BECAUSE I NEED THAT PROTECTION.

THE COURT: THEN YOU OBVIOUSLY DIDN'T UNDERSTAND WHAT I SAID. THE ATTORNEY THAT WAS REPRESENTING YOU ORIGINALLY IN THIS CASE, DETERMINED, LONG BEFORE IT CAME BEFORE ME, THAT THIS ROOM IS NOT PART OF THAT COLLECTIVE

BARGAINING AGREEMENT. THAT'S THE LAW OF THE CASE. PUT THE PAPERS DOWN. I AM NOT GOING TO DEAL WITH THAT. THAT COLLECTIVE BARGAINING AGREEMENT IS NOT PART OF THIS CASE. SO I'M NOT -- IF ALL YOU'RE GOING TO TELL ME IS ABOUT THE COLLECTIVE BARGAINING AGREEMENT, THEN THIS TRIAL'S GOING TO END RIGHT NOW. BECAUSE THAT ISSUE HAS BEEN RESOLVED.

APPENDIX H

Date: 5/19/05 OCA Case # _____

Grievant: Hector Vargas

Employer: 2727 Realty L L C

Premises: 2727 University Ave. Bsmt

To Local 32Bj, SEIU, AFL - CIO

Please be advised that I, Hector Vargas wish to have, Morris Markowitz, Esq., my attorney, represent me in my arbitration case at the office of the Contract Arbitrator scheduled for 5/19/2005, and all necessary appearances, thereafter, Although the Union has offered to provide me legal representation, I have chosen to refuse that offer and have chosen to have my attorney, as listed elsewhere, to act as my legal representative.

I hereby waive any right that I have or may have against Local 32BJ, SEIU, AFL-CIO IN connection with their obligations to represent me in this arbitration hearing, and all necessary

appearances thereafter, and agree to release and hold it harmless for any all consequences that may arise as a result o the arbitration as a result of my choice to have outside counsel represent me in this matter. I also recognize that the Union's attorney shall be present in the hearing in order to represent Local 32BJ and its interests in this matter. Additionally, I hereby acknowledge that there are only three parties to the collective bargaining agreement and this arbitration hearing. These parties are Local 32BJ, SEIU, AFL-CIO, The Realty Advisory Board on Labor Relations, Inc., and the employer, 2727 Realty LLC et al I herby acknowledge that the above statements are true and that I fully understand them and the consequences thereof.

	"/s/"	"/s/"
By:	Local 32BJ, SEIU, AFL-CIO	Grievant
	Date: 5/19/05	Date: 5/19/05

"s/"
Attorney for Grievant
Date: 5/19/05